Affirmed and Opinion filed June 7, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-00-00128-CR

———————————

ROBERT JUSTIN KAUPP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 803792

O P I N I O N

Over his plea of not guilty, appellant, Robert Justin Kaupp, was found guilty of murder. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). The jury assessed appellant's punishment at fifty-five years confinement in the Texas Department of Criminal Justice, Institutional Division. In three points of error, appellant complains that (1) his confession was the result of an illegal arrest, and therefore should not have been admitted into evidence; (2) his confession was inadmissible because it was obtained in violation of a state statute regarding enticement of a minor child; and (3) the State's jury argument improperly speculated on

matters that were not introduced into evidence. We affirm.

FACTUAL BACKGROUND

Fourteen-year-old Destiny Thetford, the complainant, disappeared on January 13, 1999. In the course of its investigation, the Harris County Sheriff's Department learned that Nicholas Thetford, the complainant's 19-year-old half-brother, had a sexual relationship with the complainant, and that Thetford and appellant were together on the day the complainant disappeared. On January 26, both Thetford and appellant came to the sheriff's department offices. Appellant was cooperative and allowed to leave; Thetford, however, was interviewed at length and given a polygraph examination, which he failed (his third such failure). Thetford eventually admitted to stabbing the complainant and placing her body in a drainage ditch. Additionally, Thetford implicated appellant as having participated in the stabbing and hiding of the complainant's body.

Immediately after obtaining a written statement from Thetford, detectives attempted but were unable to obtain a warrant for appellant's arrest. Detective Gregory Pinkins testified that he nevertheless decided at that point to "get [appellant] in and confront him with what Thetford had said." Pinkins testified that he, two other plain clothes detectives, and three uniformed officers went to appellant's home, where they arrived between 2:00-3:00 in the morning of January 27. Pinkins knocked on the front door, and appellant's father answered and led Pinkins, Detective Larry Davis, and two of the officers to appellant's bedroom. Using his flashlight, Pinkins found appellant lying on a mattress on the floor. According to both Pinkins and Davis, Pinkins identified himself to appellant and told him that "we need to go and talk," to which appellant responded "Okay." The two officers then went into the room and handcuffed appellant. Appellant was escorted from the house in his boxer shorts and a T-shirt and placed into a patrol car.

Sometime after appellant was placed in the patrol car, the detectives learned that the complainant's body had been found. Appellant was taken directly from his home to the scene

where the body was located. According to Pinkins, this was done to let appellant know that Thetford had given them the information to locate the body. They stayed at this location for approximately five to ten minutes before proceeding to the sheriff's department.

Appellant was eventually transported to the Lockwood Substation, where he was taken to an interview room and his handcuffs were removed. Appellant initially denied any involvement in the complainant's disappearance, but later admitted that he was involved, although he never admitted to causing any fatal wound or actually confessed to the offense of murder. Appellant's statement was accepted, typed up, and given to appellant to read. Appellant acknowledged his rights on the statement, initialed that he understood and wished to waive the same, and signed the statement.

I.

Appellant's Motion to Suppress

In appellant's first point of error, he complains that the trial court erred in denying his motion to suppress and admitting his confession into evidence. Appellant moved to suppress all written or oral statements made by appellant, including the statement he signed the morning of January 27. Following a hearing, the trial court denied appellant's motion. We do not disturb a trial court's ruling on a motion to suppress unless the trial court abused its discretion. *Maxcey v. State*, 990 S.W.2d 900, 903 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Champion v. State*, 919 S.W.2d 816, 818 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd).

Appellant claims that his confession was the result of an illegal arrest, and therefore inadmissable. In its findings of fact and conclusions of law, the trial court concluded that appellant was not placed under arrest prior to his admission that he was involved in the complainant's disappearance. Because we find no error in this conclusion, we conclude that appellant's confession was not inadmissible as the product of an illegal arrest.

Appellant contends he was arrested without a warrant when he was handcuffed in his bedroom the morning of January 27, placed into a patrol car, and transported to the sheriff's department and interrogated. Under the Code of Criminal Procedure, a person is arrested when "he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant." TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977). A person is in "custody" only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest. *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). The determination of custody is based entirely on objective circumstances. *Id.* The Court of Criminal Appeals has outlined four general situations which may constitute custody:

> (1) when the suspect is physically deprived of his freedom of action in any significant way,
>
> (2) when a law enforcement officer tells the suspect that he cannot leave,
>
> (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and
>
> (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.[1]

Id. at 255. The determination of custody must be made on a case-by-case or ad hoc basis after consideration of all of the objective circumstances. *Id.*

It is undisputed appellant was never told that he could not leave, nor was he told that there was probable cause to arrest him. With respect to the first and third scenarios outlined in *Dowthitt*, the State contends that appellant voluntarily consented to accompany law enforcement officers to the station in furtherance of their investigation. If the circumstances show that a person is being transported only upon the invitation, request, or even urging of the

[1] With respect to this fourth situation, *Dowthitt* further requires that the officers' knowledge of probable cause be manifested to the suspect. *Id.* at 255.

police, and there are no threats, express or implied, that he will be taken forcibly, the accompaniment is voluntary, and that person is not then in custody. *Shiflet v. State*, 732 S.W.2d 622, 628 (Tex. Crim. App. 1985). The test for whether a citizen's encounter with a law enforcement officer is consensual is whether "a reasonable person would feel free 'to disregard the police and go about his business.'" *Hunter v. State*, 955 S.W.2d 102, 104 (Tex. Crim. App. 1997) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991)). The trial court must look at the totality of the circumstances surrounding a statement of consent to determine if that consent was voluntary. *Lackey v. State*, 638 S.W.2d 439, 447 (Tex. Crim. App. 1982).

The testimony adduced at the hearing on appellant's motion for suppress revealed that, prior to the morning of January 27, the following events had occurred:

- appellant had met Detective Pinkins previously in connection with the investigation into the complainant's disappearance;
- on at least two previous occasions, appellant voluntarily went to the sheriff's department to answer questions and take a polygraph examination in connection with the investigation;
- on both prior occasions, appellant was allowed to leave the sheriff's department and was given no reason to believe that he was a suspect in the investigation;
- on one of those occasions, appellant had been placed in handcuffs before being transported in a patrol car, and the handcuffs were removed once appellant arrived at the station;
- appellant had never been questioned in connection with the investigation at any location other than the sheriff's department.

On the morning of January 27, after being allowed into appellant's house by his father and led to appellant's bedroom, Detective Pinkins identified himself to appellant and told him they "need to go and talk," to which appellant replied "Okay." Although Pinkins's weapon was visible, neither he nor any of the other officers had their guns drawn. There was no evidence of any threat, either express or implied, that appellant would be forcibly taken to the station

for questioning. In fact, no other conversation took place between any of the officers and appellant, and none of the officers even approached appellant until after he had responded to Pinkins. At the time appellant responded, we conclude that a reasonable person in appellant's situation would have felt free to say "no" or otherwise to disregard Detective Pinkins and go about his business. *See Hunter*, 955 S.W.2d at 104. Instead, by saying "Okay," appellant indicated his consent to accompany Pinkins to the sheriff's department offices for questioning.[2]

Appellant contends that he was placed into custody when he was handcuffed and placed into a patrol car. However, there is no bright-line test providing that mere handcuffing is always the equivalent of an arrest. *Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997). Several of the State's witnesses testified that individuals are routinely handcuffed for safety purposes before being transported in a patrol car. Significantly, the testimony showed that when appellant voluntarily went to the sheriff's department in a patrol car just the day before, he was placed in handcuffs before getting in the car, and the handcuffs were removed at the station. Given appellant's consent to accompany Detective Pinkins to the station for questioning, and given his familiarity with the transport procedures, we find that a reasonable person in appellant's position would not believe that being put in handcuffs was a significant restriction on his freedom of movement. Furthermore, appellant did not resist the use of handcuffs or act in a manner consistent with anything other than full cooperation with the law enforcement officers transporting him.[3]

---

[2] At the suppression hearing, appellant disputed that any conversation took place between Pinkins and himself before he was placed in handcuffs. However, we afford almost total deference to the trial court's determination of the historical facts that the record supports, especially when the court's fact findings are based on an evaluation of witness credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997).

[3] Appellant asserts that the fact he was taken outside his home wearing only a T-shirt and boxer shorts, with no shoes, is indicative of an arrest rather than a voluntary accompaniment. Appellant presented no evidence, however, that he ever requested an opportunity to dress or that he otherwise complained about his attire during the time he was transported to the police station.

Accordingly, we find that the trial court did not err in concluding that appellant had not been arrested before he admitted his involvement in the complainant's death. Appellant's first point of error is overruled.[4]

II.
Enticing a Child

In point of error number two, appellant complains the trial court erred in admitting his confession into evidence because the confession was obtained after law enforcement officers took appellant from his parents' possession in violation of section 25.04 of the Penal Code.[5] Appellant contends that because his confession was obtained in violation of section 25.04, the trial court was required to suppress it pursuant to article 38.23 of the Texas Code of Criminal Procedure.[6]

To preserve error, the complaining party must first afford the trial court an opportunity to rule on the specific complaint. *Meyers v. State*, 865 S.W.2d 523, 524 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd); *see* TEX. R. EVID. 103(a) (stating that error may not be

---

[4] We recognize that this case must be narrowly construed based on the unique facts presented. We express no opinion concerning the outcome of a situation involving similar circumstances, but where the individual had no previous interaction with the police department and its investigative procedures.

[5] Section 25.04, titled "Enticing a Child," states in part:

> A person commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, he knowingly entices, persuades, or takes the child from the custody of the parent or guardian or person standing in the stead of the parent or guardian of such child. [TEX. PEN. CODE ANN. § 25.04(a) (Vernon Supp. 2001).]

At the time of the alleged offense, appellant was 17 years old.

[6] Article 38.23 states, in relevant part:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence against the accused on the trial of any criminal case. [TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon Supp. 2001).]

predicated upon the trial court's admission of evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection"). The purpose of requiring a timely and specific objection is to allow the trial court the opportunity to make a determination and ruling on the objection and then to proceed with the trial under the proper procedural and substantive manners, as appropriately corrected by the trial court. *Janecka v. State*, 823 S.W.2d 232, 243-44 (Tex. Crim. App. 1992) (op. on reh'g).

In this case, appellant never asserted section 25.04 or article 38.23 as a basis of his objection in the trial court. Appellant failed to raise this argument in his written motion to suppress or at any point during the pretrial hearing on that motion. At trial, appellant's counsel asserted the following objection to the introduction of appellant's written confession:

> We would object to the introduction of State's Exhibit No. 2 for all the reasons previously stated, both at the pretrial hearing and during the trial of this case. Additionally, we would object that the consent of the parents was not gained in order to waive the substantial legal rights enumerated on the front page of the confession. . . . Those would be the objections to the confession, that it was not free and voluntary.

Appellant's objection is not sufficiently specific to make the trial court aware appellant was asserting that his confession was obtained in contravention of section 25.04 of the Penal Code, and thus should have been suppressed pursuant to article 38.23(a) of the Texas Code of Criminal Procedure. *See* TEX. R. APP. P. 33.1(a). Because appellant's trial objection does not comport with his argument on appeal, appellant has failed to preserve error on this issue. *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996). An argument on appeal that does not comport with the trial objection presents nothing for review. *Coffey v. State*, 796 S.W.2d 175, 180 (Tex. Crim. App. 1990).

Because appellant's objection at trial did not preserve error, appellant's second point of error is overruled.

III.

Improper Jury Argument

In his third point of error, appellant asserts the trial court erred in overruling his objections to what he claims was improper jury argument by the State. To be proper, jury argument must fall within one of four categories: (1) summary of the evidence, (2) reasonable deduction from the evidence, (3) response to argument of opposing counsel, and (4) plea for law enforcement. *Long v. State*, 823 S.W.2d 259, 267 (Tex. Crim. App. 1991). Appellant complains the prosecutor impermissibly called on the jury to speculate about the content of Nicholas Thetford's confession, which was not admitted as evidence. We find that the State's jury argument was proper as a response to the argument of appellant's counsel.

During the cross-examination of Detective Larry Davis, appellant's counsel attempted to impeach Davis with testimony he had given at the pretrial hearing on appellant's motion to suppress. Specifically, appellant's counsel introduced Davis's testimony that while questioning appellant the morning of January 27, Davis provided appellant with information that Nicholas Thetford had given him, such as appellant being at the scene, Thetford taking the complainant outside the house, and then Thetford stabbing the complainant before handing the knife to appellant. Before Davis was called as a witness at trial, Thetford himself testified and gave his account of the events surrounding the complainant's death.

During jury argument, appellant's counsel made the following argument with respect to his client's confession:

> I want you to read it carefully when you go back there. And when you do, you will see that it is consistent with the first confession that Nicholas Thetford gave.

Appellant's counsel then again read Davis's testimony from the pretrial hearing to the jury and stated:

> Nicholas Thetford confessed and said: I handed my knife to Robert Kaupp. Now, he's telling you something different about the knives and all kinds of stories.

In rebuttal, the prosecutor made the following argument, which serves as the basis for appellant's third point of error:

> Also, something real, real important that you need to think about. Nick Thetford gave both a written and a videotape confession. If he says what Davis said he said, they would show you this confession.
>
> . . . .
>
> That's right. It's not submitted to the jury because Davis was confused in that big loose-leaf looking transcript they had of the pretrial hearing. Davis got confused on one issue and they would like you to believe that was Nick Thetford's confession. If that was Nick Thetford's confession, Nick Thetford's confession would have been submitted into evidence as a prior inconsistent statement.
>
> . . . .
>
> Nick's videotaped confession where he said something different than he said on the stand would have been admitted. On their effective cross-examination – or perhaps it was on my direct. I forget which – Davis got confused on one point and they would like you to believe that is Nick Thetford's confession. It's not. That's just Davis reciting what he thought were some investigative techniques. And if he got the facts mixed up, shame on Davis, but that's not Nick Thetford's confession. Nick Thetford's confession is not evidence. They didn't offer it into evidence because it is not consistent –
>
> . . . .
>
> I can't introduce a prior consistent statement. They can introduce a prior inconsistent statement.

Viewed in context, it is clear that the prosecutor was merely responding to appellant's counsel's suggestion that Thetford had given police a confession that was inconsistent with his trial testimony regarding appellant's role in the murder. Hence, appellant's counsel opened the door to a response by the prosecution that if Thetford's confession was truly inconsistent with his testimony at trial, the confession could have been used by appellant's counsel to impeach Thetford on the stand. *See* TEX. R. EVID. 613. Argument in response to and invited by opposing counsel does not constitute reversible error even though it refers to a matter not in evidence. *Miller v. State*, 479 S.W.2d 670, 672 (Tex. Crim. App. 1972). We overrule

appellant's third point of error.

The judgment below is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 7, 2001.

Panel consists of Justices Yates, Fowler, and Lee[7].

Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Senior Justice Norman Lee sitting by assignment.